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No. 95-1102

In the Supreme Court of the United States

OCTOBER TERM, 1995

FGS CONSTRUCTORS, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Indian Self-Determination and Education Assistance Act, which renders the United States liable under the Federal Tort Claims Act for claims arising from "the performance of functions * * * under a contract, grant agreement, or cooperative agreement authorized by the * * * Act" by "an Indian tribe, tribal organization, or Indian contractor," extends the liability of the United States to liability on claims arising from the performance of subcontracts between an Indian tribe and a private party.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 64 F.3d 1230. The decision of the district court (Pet. App. 14a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12a) was entered on September 5, 1995. The petition for a writ of certiorari was filed on December 4, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1989, pursuant to the Indian Self-Determination and Education Assistance Act (the Self-Determina-

tion Act), 25 U.S.C. 450 *et seq.*, the United States, through the Bureau of Indian Affairs (BIA), entered a self-determination agreement with the Oglala Sioux Indian Tribe (the Tribe), agreeing to provide funding for the Tribe to repair the White Clay Dam, located on the Pine Ridge Indian Reservation. The Tribe hired Cooper Consultants, Inc. (CCI) to be the project engineer and Carlow Enterprises (Carlow) to be the general contractors. The contracts with CCI and Carlow were approved by the government. Carl and Carole Oberlitner provided Carlow with a surety bond, guaranteeing Carlow's performance on the contract. Pet. App. 2a. Carlow then hired petitioner, FGS Constructors, Inc., as a subcontractor to perform repair and reconstruction work on the dam gates and spillway. *Ibid.* Petitioner asserts that CCI failed to drain the dam fully, which delayed petitioner's performance of the subcontract, and that CCI failed to pay for completed work. See Pet. 6-10.

Petitioner brought suit in the United States District Court for the District of South Dakota against Carlow for breach of contract, against the Oberlitners for enforcement of the surety bond, and against the United States for negligence under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.* Pet. App. 3a. Plaintiff's theory for suing the United States under the FTCA was that the Self-Determination Act allows petitioner to impute to the United States the alleged negligence of the engineering contractor hired by the Tribe. *Ibid.*

The district court granted summary judgment for the United States, holding that the Self-Determination Act does not permit tort claims against the United States for the alleged negligence of the parties with which the tribal organization subcon-

tracts. Pet. App. 24a-25a. Specifically, the district court concluded that the language of the Self-Determination Act authorizing tort claims against the United States arising from the performance of functions "under a contract, grant agreement or cooperative agreement authorized by the [Act]" by an "Indian tribe, tribal organization, or Indian contractor" provided FTCA coverage only for negligence by Indian organizations acting pursuant to self-determination contracts into which they had entered with the United States.[1] Pet. App. 24a. By statutory definition, the district court observed, a "self-determination contract" is one between the United States and an Indian tribal organization. Pet. App. 24a; 25 U.S.C. 450b(j), 450f. The Tribe's separate agreement with CCI was not and could not be a self-determina-

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[1] The Self-Determination Act provides, in relevant part:

> With respect to claims resulting from the performance of functions * * * under a contract, grant agreement, or cooperative agreement authorized by the Indian Self-Determination and Education Assistance Act of 1975 * * * an Indian tribe, tribal organization, or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior or the Indian Health Service in the Department of Health and Human Services while carrying out any such contract * * * and its employees are deemed employees of the Bureau or Service while acting within the scope of their employment in carrying out the contract or agreement[.] * * * [A]ny civil action * * * involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will * * * be afforded the full protection and coverage of the Federal Tort Claims Act.

Pub. L. No. 101-512, § 314, 104 Stat. 1959-1960.

tion contract. Pet. App. 21a. The district court also concluded that the CCI contract was "mere[ly] attach[ed]" to the self-determination contract between the United States and the Tribe, and that that attachment was insufficient to render the CCI contract a self-determination contract. Pet. App. 22a. Finally, the district court rejected petitioner's argument that CCI should be considered an "Indian contractor" within the meaning of the Act, solely because CCI is a firm owned by Indians. Pet. App. 25a. The court noted that under petitioner's proposed interpretation, "the government could be subjected to extensive liability" for the actions of subcontractors, forcing the United States closely to monitor and supervise such subcontractors. *Ibid.* This would "completely undermine the purpose of the [Self-Determination Act] to transfer control of programs and services for Indians from the government to the Indian people." *Ibid.*

The court of appeals affirmed. The court agreed with the district court's determination that "by definition, the [Self-Determination Act] does not contemplate that a private party such as CCI can enter into a self-determination contract." Pet. App. 9a. The court of appeals concurred with the district court's understanding of the statute's policy of promoting Indian self-determination, stating that "the purpose and policy of the [Act] are best served if the term 'Indian contractor' is limited to a tribe-related organization that may itself enter into a self-determination contract." Pet. App. 10a.

ARGUMENT

1. Petitioner contends (Pet. 13-19) that the Self-Determination Act extends the tort liability of the

United States to claims arising from torts allegedly committed during the performance of subcontracts to which the United States is not a party. That contention is contrary to the plain language of the Self-Determination Act. The Act limits FTCA coverage to tort "claims * * * resulting from the performance of functions * * * under a contract, grant agreement, or cooperative agreement authorized by the Indian Self-Determination and Education Assistance Act of 1975." § 314, 104 Stat. 1959-1960. The Self-Determination Act authorizes only "self-determination contracts." 25 U.S.C. 450f.[2] Self-determination contracts are contracts between Indian tribal organizations and the federal government. 25 U.S.C. 450b(j) (a "self-determination contract" is "a contract * * * between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services * * * otherwise provided to Indian tribes and their members pursuant to Federal law"). Thus, under the Self-Determination Act, a "self-determination contract" can involve only two specified parties: a "tribal organization" and one of the Secretaries empowered to make such agreements.

Petitioner argues (Pet. 18) that, because Section 314 extends FTCA coverage to claims against an "Indian contractor" "under a contract * * * authorized by the Indian Self-Determination and Education Assistance Act of 1975," § 314, 104 Stat. 1959, it should be read to cover contracts involving "Indian

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[2] The Self-Determination Act also authorizes certain grants, 25 U.S.C. 450h, and extends FTCA coverage to actions under the attendant grant agreements, § 314, 104 Stat. 1959-1960. Such agreements are not at issue here.

contractors" "carrying out the functions" of a self-determination contract pursuant to a subcontract. There is no basis for that reading of the statute. The only contracts "authorized by" the Self-Determination Act are "self-determination contracts" with the United States. The lower courts therefore correctly concluded that a contractor is covered by Section 314 only if the contractor itself can be and is a party to a self-determination contract. Pet. App. 10a.

The legislative history underscores Congress's intent that only the federal government and a tribal governing body can be parties to a self-determination contract: "The term 'self-determination contract' means an *intergovernmental contract* that is not a procurement contract" between the United States and the tribal governments. S. Rep. No. 274, 100th Cong., 2d Sess. 18 (1987) (emphasis added). A contract between a private party and an Indian tribe cannot be a "self-determination contract," and therefore cannot give rise to FTCA liability under this definition.

The legislative history of an earlier version of the Section providing FTCA coverage also demonstrates that Congress meant the provision to cover only tribal organizations that enter self-determination agreements with the United States, not to extend to parties in the position of CCI. In discussing Indian health services funded by the Self-Determination Act, Congress stated that the FTCA would not cover "those [parties] with whom the tribal organization may contract." S. Rep. No. 274, *supra*, at 26-28. Thus, if a tribe enters a contract with a private physician to provide care to Indians, "[s]uch physicians are not employees of the United States: they are independent contractors" and "their acts of negligence cannot be imputed to the United States" under the

FTCA. *Id.* at 26. In this case, CCI, a private firm hired by the Tribe to provide engineering services, is in the same position as a private physician hired by a tribe to provide medical services.

2. Petitioner also argues (Pet. 20) that the government "'modified' the [self-determination] contract to include CCI's contract." The district court found that the contract between the Tribe and CCI was "mere[ly] attach[ed]" to the self-determination contract, such that the Tribe's contract with CCI was not part of the self-determination contract. That factual finding does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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